

Administrative Hearing Commission

Attorney Fees Statutes And Discovery Rules

(Part III)

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RULE 57.07 USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 57.03(b)(4) or 57.04(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of any witness who is not present in court may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that by reason of age, sickness, bodily infirmity or imprisonment, the witness is unable to or cannot safely attend court; or (C) that the witness is a judge of a court of record, a practicing attorney or physician and engaged in the discharge of his official or professional duty at the time of trial; or (D) that the witness resides out of the state; or (E) that the witness resides in a county other than the one in which the trial is held; or (F) that the witness has gone out of the state or is a greater distance than 40 miles from the place of trial without the consent, connivance or collusion of the party; or (G) that the witness is absent without the consent, connivance or collusion of the party and the party in the exercise of due diligence has been unable to procure the attendance of the witness by subpoena.

(b) Proof of Facts Authorizing Use. The facts which would authorize the use of the deposition may be established by the testimony of the deposing witness or by the certificate of the officer taking the deposition or by any competent evidence.

(c) Objections at Depositions – How Made. Objections to competency of a witness examined, or to the competency or relevancy or materiality of any question put to him, or of any answer given by him, may be made in the same manner and with the like effect as if such witness were personally present; and any failure to

make such objection at the taking of the deposition, although the objecting party may be present, shall not prejudice his right to make such objections at the trial of the civil action except as provided in subdivision (d) of this Rule.

(d) Effect of Errors and Irregularities in Depositions.

(1) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Depositions.* (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. (B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. (C) Objections as to the form of written questions submitted under Rule 57.04 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within ten days after service of the last questions authorized.

(4) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 57.03 and 57.04 are waived unless a motion to suppress the depositions or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 57.09 SUBPOENA FOR TAKING DEPOSITION

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the officer or person before whom depositions may be taken as designated in Rule 57.05 or 57.06 or by the clerk of the court in which the civil action is pending, shall state the name of the court and the title of the civil action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. A subpoena may be served by the sheriff, by a sheriff's deputy, or by any other person who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees and mileage the witness would have been entitled to receive for attending court pursuant to subpoena.

(d) Authorization to Issue Subpoena. Proof of service of a notice to take a deposition as provided in Rules 57.03 and 57.04 is sufficient to authorize the issuance of a subpoena for taking a deposition.

(e) Contempt. Any person who without adequate excuse fails to obey a subpoena served upon the person may be held in contempt of the court in which the civil action is pending.

RULE 57.10 TAXING AND CERTIFYING COSTS

(a) Costs – How Taxed. The costs of taking depositions shall be taxed in favor of the party paying the same and taxed as other costs in the civil action.

(b) Costs – How Certified and Taxed. The costs shall be certified by the person before whom the deposition is taken in the amount provided by law.

RULE 58. PRODUCTION OF DOCUMENTS AND THINGS AND

ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

RULE 58.01 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designed documents (including writings, drawings, graphs, charts, photographs, phono records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 56.01(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, and photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 56.01(b).

(b) **Procedure.** The request may be served upon the plaintiff without leave of court after commencement of the action and upon any other party with or after service of the summons and petition upon that party. At the time of such service, the requesting party also shall serve a copy, along with a notice stating the name and address of the party who is to respond, upon each additional party, if any. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons and petition upon that defendant. The court may allow a longer or a shorter time. At the time of such service, the responding party shall serve a copy of such written responses upon each additional party, if any. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated.

If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 61.01 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Filing. The request and responses thereto shall not be filed with the court except upon court order or contemporaneously with a motion placing the request in issue. However, both when the request and responses are served, the party serving them shall file with the court a certificate of service. The certificate shall show the caption of the case, the name of the party served, the date and manner of service, and the signature of the serving party or attorney. Each party filing a certificate shall maintain a copy of the document that is the subject of the certificate until the case is finally disposed.

(d) Persons Not Parties. This Rule 58.01 does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

RULE 59. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

RULE 59.01 REQUEST FOR AND EFFECT OF ADMISSIONS

(a) Request for Admissions. After commencement of an action a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 56.01(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. A request may not be served upon a defendant until the expiration of thirty days after valid service of process upon the defendant. Copies of the documents shall be served with the request unless copies have already been furnished.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or a longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or

by the party's attorney, but unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of sixty days after service of the summons and petition upon such defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, such party shall specify so much of it as true and qualify or deny the remainder. An answering party may give lack of information or knowledge as a reason for failure to admit or deny if such party states that the party has made reasonable inquiry and the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; such party may deny the matter, subject to the provisions of Rule 61.01(c), or set forth reasons why the party cannot admit or deny it.

(b) Filing Request and Responses. The request and response thereto shall not be filed with the court except upon court order or contemporaneously with a motion placing the request in issue. However, both when the request and the response are served the party serving them shall file with the court a certificate of service. Each party filing a certificate shall maintain a copy of the document that is the subject of the certificate until the case is finally disposed.

(c) Effect of Admission. Any matter admitted under this Rule 59.01 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 62.01 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. Any admission made by a party under this Rule 59.01 is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

RULE 60. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

RULE 60.01 EXAMINATION AND REPORT

(a) Order for Examination. In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to physical or mental or blood examinations by physicians or other appropriate licensed health care providers or to produce for such examination such party's agent or the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person against whom the order is sought and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Findings.

(1) If requested by the party against whom an order is made under Rule 60.01(a) or the person examined, the party causing the examination to be made shall deliver to the person or party making the request a copy of a detailed written report of the examining licensed health care provider setting out the findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows an inability to obtain it. The court on motion shall make an order against a party requiring delivery of a report on such terms as are just; if a licensed health care provider fails or refuses to make a report, the court may exclude the licensed health care provider's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege the person may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the person in respect of the same mental or physical condition.

(3) Rule 60.01(b) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise, and does not preclude discovery of a

report of an examining licensed health care provider or the taking of a deposition of the licensed health care provider in accordance with the provisions of any other rule.

RULE 61. ENFORCEMENT OF DISCOVERY: SANCTIONS

RULE 61.01 FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Failure to Act – Evasive or Incomplete Answers. Any failure to act described in this Rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed timely objections to the discovery request or has applied for a protective order as provided by Rule 56.01(c).

For the purpose of this rule, an evasive or incomplete answer is to be treated as a failure to answer.

(b) Failure to Answer Interrogatories. If a party fails to answer interrogatories or file objections thereto within the time provided by law, or if objections are filed thereto which are thereafter overruled and the interrogatories are not timely answered, the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just and among others the following:

(1) An order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.

(2) Upon the showing of reasonable excuse, the court may grant the party failing to answer the interrogatories additional time to file answers but such order shall provide that if the party fails to answer the interrogatories within the additional time allowed, the pleadings of such party shall be stricken or the action be dismissed or that a default judgment shall be rendered against the disobedient party.

(c) Failure to Answer Request for Admissions. If a party, after being served with a request to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, fails to file answers or objections thereto, as required by Rule 59.01, the genuineness of any relevant documents or the truth of any relevant and material matters of fact contained in the request for admissions shall be taken as admitted. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 59.01, and if the party requesting the admissions thereafter

proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that: (1) the request was held objectionable pursuant to Rule 59.01, (2) the admission sought was of no substantial importance, (3) the party failing to admit had reasonable grounds to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure to Produce Documents, and Things or to Permit Inspection. If a party fails to respond that inspection will be permitted as requested, fails to permit inspection, or fails to produce documents and tangible things as requested under Rule 58.01, or timely files objections thereto that are thereafter overruled and the documents and things are not timely produced or inspection thereafter is not timely permitted, the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just and among others the following:

(1) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibit the disobedient party from introducing designated matters in evidence.

(2) An order striking pleadings or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof or, rendering a judgment by default against the disobedient party.

(3) An order treating as a contempt of court the failure to obey.

(4) An order requiring the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(e) Failure to Appear for Physical Examination. If a party fails to obey an order directing a physical or mental or blood examination under Rule 60.01, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just, and among others, it may take any action authorized under Rules 61.01(d)(1), (2), and (4). Where a party has failed to comply with an order requiring the production of another for examination, the court may enter such orders as are

authorized by this Rule 61.01, unless the party failing to comply shows an inability to produce such person for examination.

(f) Failure to Attend Own Deposition. If a party or an officer, director or managing agent of a party or a person designated under Rules 57.03(b)(4) and 57.04(a), to testify on behalf of a party, fails to appear before the officer who is to take his deposition, after being served with notice, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just and among others, it may take any action authorized under paragraphs (1), (2), (3) and (4) of subdivision (d) of this Rule.

(g) Failure to Answer Questions on Deposition. If a witness fails or refuses to testify in response to questions propounded on deposition, the proponent of the question may move for an order compelling an answer. The proponent of the question may complete or adjourn the deposition examination before applying for an order. In ruling upon the motion, the court may make such protective order as it would have been empowered to make on a motion pursuant to Rule 56.01(c).

If the motion is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court, after opportunity for hearing, shall require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

If the motion is granted and if the persons ordered to respond fail to comply with the court's order, the court, upon motion and reasonable notice to the other parties and all persons affected thereby, may make such orders

in regard to the failure as are just, and among others, it may take any action authorized under Rule 61.01(d).

(h) Objections to Approved Discovery. If objections to Rule 56.01(b)(5) approved interrogatories or requests for production are overruled, the court may assess against such objecting party, attorney, or attorney's law firm, or all of them, the attorney's fees reasonably incurred in having such objection overruled. If such fees are not paid within sixty days, the court may enter such other appropriate orders against the disobedient party, including an order striking pleadings, dismissing the action, or entering a judgment by default.